



DECISION ON REQUEST FOR REVIEW

Case nos.

**CH/98/1309, CH/98/1312, CH/98/1314, CH/98/1318, CH/98/1319,
CH/98/1321, CH/98/1322, CH/98/1323 and CH/98/1326**

**Almasa KAJTAZ, Dobrila BIJEDIĆ, Azira SIVČEVIĆ, Altijana MEŠIĆ, Rasema BEGIĆ, Elvedin
DEVIĆ, Radenka CVIJETIĆ, Jasna ŠLJIVO and Dženana ŠEHOVIĆ**

against

BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on
February 2002 with the following members present:

7

Ms. Michèle PICARD, President
Mr. Giovanni GRASSO, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN
Mr. Mato TADIĆ

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the respondent Party's request for a review of the decision of the First Panel of the Chamber on the admissibility and merits of the aforementioned case;

Having considered the Second Panel's recommendation;

Adopts the following decision pursuant to Article X(2) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina as well as Rules 63-66 of the Chamber's Rules of Procedure:

I. FACTS AND COMPLAINTS AND SUMMARY OF THE PROCEEDINGS BEFORE THE CHAMBER

1. The applicants, who are of various origins, were employees in the Ministry of Justice and General Administration of the Republic of Bosnia and Herzegovina. In December 1997, a new Ministry for Civil Affairs and Communication (the “Ministry”) was established, and the applicants were not officially assigned to any post within this new Ministry.

2. The applicants alleged that after the establishment of the Ministry, they continued working within the new Ministry, in the same positions previously held within the Ministry of Justice and General Administration, until various dates in the beginning of 1999. On 8 September 1998, they learned that they had been relegated to the status of “unassigned” workers and that as a result they received lower salaries than other employees and stopped receiving benefits commencing on or around June 1998. They stopped receiving any compensation on 31 December 1998, and they actually ceased working at different times between January and March 1999. The applicants have never received procedural decisions terminating their working relations or relegating them to the status of unassigned workers.

3. In November 1998 the applicants, except for Dženana Šehović, initiated civil proceedings before the Municipal Court I in Sarajevo. The applicants requested compensation for lost salaries and other income due from their working relations. The applicants were allegedly unable to institute proceedings requesting reinstatement because they never received procedural decisions actually terminating their employment. To date, no decision has been issued in any of the applicants’ cases.

4. The applicants complained that they had not received procedural decisions regulating their employment, that they were summarily dismissed from their jobs with the Ministry of Civil Affairs and Communication, and that the Law on State Administration was not complied with. The applicants also complained that they were discriminated against in their right to employment based on their national origin. Four of the applicants complained, specifically, that they were discriminated against based on the fact that they are from mixed ethnic backgrounds.

5. On 7 September 2001 the First Panel delivered its decision on admissibility and merits in these applications. It found the applications admissible in their entirety. Further, it found that the applicants’ right of access to court under Article 6 of the European Convention on Human Rights (“the Convention”) had been violated and that all the applicants had been discriminated against in their right to access to public service as guaranteed by Article 25(c) of the International Covenant on Civil and Political Rights, Bosnia and Herzegovina thereby being in breach of Article I of the Agreement. The First Panel further awarded compensation for both pecuniary and non-pecuniary damages to all the applicants.

6. On 4 October 2001 the respondent Party submitted a request for review of the decision on admissibility and merits. In accordance with Rule 64(1) of the Chamber’s Rules of Procedure, the Second Panel considered the request for review.

II. THE REQUEST FOR REVIEW

7. In its request for review, the respondent Party challenges the First Panel’s decision on admissibility and merits on the grounds that (a) Article 6 of the Convention was wrongly applied in these applications because the applicants are civil servants, (b) the First Panel wrongly established a violation of Article 6 paragraph 1 of the Convention because the domestic court acted fairly and did not exceed a reasonable time period, (c) the Chamber was not competent to consider the applicants’ complaints under Article 25 of the International Covenant on Civil and Political Rights absent “alleged or apparent discrimination” in relation to the rights guaranteed by the Covenant, and (d) the compensation awarded was incorrectly calculated because it was based only on the submissions of the applicants.

III. OPINION OF THE SECOND PANEL

8. The Second Panel notes that the request for review has been lodged within the time limit prescribed by Rule 63(3)(a) of the Chamber's Rules of Procedure. The Second Panel recalls that under Rule 64(2), the Chamber "shall not accept the request unless it considers (a) that the case raises a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance and (b) that the whole circumstances justify reviewing the decision."

9. The respondent Party has complained that the applicants' claims fall outside the scope of Article 6 of the Convention because the applicants were civil servants, employed under the discretionary executive powers of the State of Bosnia and Herzegovina, and thus their claims do not qualify as "civil rights". However, the respondent Party never raised this objection at any point during the proceedings before the First Panel. The Second Panel notes that the party seeking review is barred, in its request for review, from raising new issues of fact or law that could have been raised in the course of the proceedings before the First Panel. Accordingly, the Second Panel is of the opinion that insofar as the respondent Party, for the first time, objects to the admissibility of these applications under Article 6 of the Convention, based on the fact that the applicants are civil servants, the request for review cannot be accepted. The Second Panel notes that the Chamber has consistently found that where a party requests review of a decision on the basis of factual or legal arguments it failed to raise during the first-instance proceedings before the Panel, it cannot be said that "the whole circumstances justify reviewing the decision" as required by Rule 64(2)(b).

10. Although not fully articulated in the request for review, the Second Panel notes that the respondent Party complained in the proceedings before the First Panel that the courts of the Federation are not competent to hear cases where the State is the respondent Party (decision on admissibility and merits at paragraphs 130-131 and 142-146). In the context of these applications concerning the adjudication of rights of civil servants of the State of Bosnia and Herzegovina, this objection raises the issue of access to courts under Article 6 of the Convention.

11. The Second Panel recognises that under Article III(1) of the Constitution of Bosnia and Herzegovina, the State of Bosnia and Herzegovina has not been explicitly assigned responsibility for the administration of justice and the courts. In this case, Article III(3)(a) of the Constitution of Bosnia and Herzegovina provides that "all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities". The Constitution of the Federation of Bosnia and Herzegovina includes the judiciary in the structure of the Federation Government. Chapter IV(C), Article 1 of the Constitution of the Federation of Bosnia and Herzegovina states that "the judicial functions in the Federation shall be exercised by the courts of the Federation".

12. None the less, the Second Panel notes that Article 28 of the Law on Civil Proceedings of the Federation provides that the courts of the Federation have subject matter jurisdiction only as determined by the laws of the Federation or of the Cantons (Official Gazette of the Federation of Bosnia and Herzegovina no. 42/98). In addition, the Law on the Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina no. 29/00) provides for a competent court at the State level which shall have administrative jurisdiction over actions taken against final administrative acts or silence of the administration of the institutions of Bosnia and Herzegovina. However, to date no such Court of Bosnia and Herzegovina has been established.

13. Despite the apparent discrepancy in domestic law giving rise to the argument that State employees may not have access to courts for disputes concerning their labour relations, the Second Panel recalls that the courts of the Federation have in the past accepted jurisdiction with respect to labour relations of State employees. For example, in case no. CH/97/76 *Softić v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, the plenary Chamber held the Federation of Bosnia and Herzegovina responsible for violating the rights of the applicant under Article 6 of the Convention (decision on admissibility and merits of 8 October 2001, paragraph 103, Decisions July-December 2001). In *Softić*, the applicant was a legal adviser for the Ministry of Foreign Trade and International Communications of Bosnia and Herzegovina until the Ministry decided to retroactively terminate his employment relationship. The applicant initiated lawsuits to obtain his salary for the time when he worked for the Ministry but the Ministry refused to recognise his employment. These

lawsuits were lodged before the courts of the Federation, which accepted jurisdiction and conducted proceedings. Those domestic proceedings, however, lasted for almost four years. After considering the complexity of the case and the conduct of the parties, the Chamber concluded in *Softić* that the Federation violated the applicant's right to a fair hearing within a reasonable time under Article 6 paragraph 1 of the Convention. The Chamber noted, however, that the Federation had not objected to the applicant's status as a civil servant as excluding him from protection under Article 6 of the Convention.

14. According to the Second Panel, it is not permissible under Article 6 of the Convention that a category of persons, here State employees, have no right to access to domestic courts to resolve their legal disputes. On the one hand, it may be argued that the State is responsible for providing all persons in Bosnia and Herzegovina with the right to access to courts, and if there is an omission with respect to a category of persons, then the State would be in violation of Article 6. On the other hand, it may be argued that the right to access to courts protected by Article 6 can only extend to the courts in fact in existence in Bosnia and Herzegovina; thus, it would only extend to the courts of the Federation because there are no courts on the State level. Regardless of the resolution of this issue, what is clear is that the State cannot both fail to provide access to courts for the labour disputes of State employees and at the same time refuse to recognise the authority of the courts of the Federation to resolve such disputes. In this manner, the State can be seen to obstruct the right to access to courts and to violate Article 6 of the Convention.

15. The Second Panel is of the opinion that the possible failure of domestic law to provide State employees with access to courts to resolve their labour relations and the extent to which the State of Bosnia and Herzegovina can be held responsible for this omission under Article 6 of the Convention, raises a serious question of general importance. None the less, the Second Panel agrees with the outcome of the First Panel in the decision on admissibility and merits where it found a violation by the State of Bosnia and Herzegovina of Article 6 of the Convention. Therefore, according to the Second Panel, it cannot be said that "the whole circumstances justify reviewing the decision" in this respect, as required by Rule 64(2)(b).

16. Insofar as the respondent Party objects to the findings under Article 6 of the Convention because, in its opinion, the proceedings before the domestic courts have not gone beyond a reasonable time, the Second Panel notes that the First Panel found a violation of Article 6 on the ground that the applicants have been denied access to a court for the determination of a civil right. Its finding was not that the cases have been pending before the domestic courts beyond a reasonable time. Accordingly, it cannot be said that "the whole circumstances justify reviewing the decision" with respect to this argument, as required by Rule 64(2)(b).

17. Insofar as the respondent Party restates its argument that the Chamber was not competent to consider the applicants' complaints under Article 25 of the International Covenant on Civil and Political Rights absent "alleged or apparent discrimination" in relation to the rights guaranteed by the Covenant, the Second Panel notes that this issue has already been examined and rejected on adequate grounds by the First Panel when it considered the admissibility and merits of these applications. In the decision on admissibility and merits, the First Panel, after a thorough analysis, found "that there was differential treatment of all of the applicants, based on ethnic origin" and that the means employed were not proportional to the legitimate aim pursued (*Kajtaz*, decision on admissibility and merits, paragraphs 154-169). The respondent Party in its request for review does not raise any argument contrary to this finding; it merely restates its earlier objection with no elaboration. Accordingly, it cannot be said that "the whole circumstances justify reviewing the decision", as required by Rule 64(2)(b).

18. Finally, the respondent Party objects to the compensation awarded because it was based on the individual requests of the applicants and not on the basis of official data. The Second Panel notes that the respondent Party never objected to the compensation requested by the applicants during the proceedings before the First Panel. It did not do so either in its written observations or during the public hearing in the cases. Accordingly, it cannot be said that "the whole circumstances justify reviewing the decision" as required by Rule 64(2)(b).

19. In summary, the Second Panel is of the opinion that in the present cases, with respect to all the issues raised in the request for review, it cannot be said that the whole circumstances justify reviewing the decision of the First Panel, as required by Rule 64(2)b); that being so, the Second Panel, by 4 votes to 3, recommends that the request for review be rejected.

IV. OPINION OF THE PLENARY CHAMBER

20. The plenary Chamber agrees with the Second Panel that the request for review does not meet the two conditions required for the Chamber to accept such a request pursuant to Rule 64(2). The plenary Chamber therefore agrees to reject the request for review.

V. CONCLUSION

21. For these reasons, the Chamber, by 12 votes to 2,

REJECTS THE REQUEST FOR REVIEW.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber